Office-Supreme Court, U.S.
FILED
SEP 4 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1925

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED TRANSPORTATION UNION, PETITIONER

v.

LONG ISLAND RAILROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Long Island Railroad is a common carrier, currently owned and operated by an agency of the State of New York, that is primarily engaged in commuter service. The question presented is whether the Railway Labor Act may, consistent with the Tenth Amendment, secure to employees of the railroad the right to strike denied them by state law.

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INTEREST OF THE UNITED STATES

This case involves the constitutionality of a federal statute, the Railway Labor Act, as applied to employees of a railroad owned by an agency of the State of New York. The Secretary of Labor is the federal official responsible for enforcing many federal labor laws and for developing and maintaining a coherent national labor policy. See 29 U.S.C. 551. The National Mediation Board is the federal agency responsible for administration of the Railway Labor Act. See 45 U.S.C. 155. Resolution of the issues raised here will directly affect the jurisdiction of the NMB in its administration of the Act and could affect the responsibilities of the Secretary under other

statutes. The United States, which participated as amicus curiae in the court of appeals, accordingly has a substantial interest in the question presented in this case.[1]

STATEMENT

This case arose from a labor dispute between employees of the Long Island Railroad (LIRR), represented by petitioner United Transportation Union (UTU), and respondents LIRR and the Metropolitan Transportation Authority (MTA), the New York State agency that now owns and operates the LIRR. Petitioner UTU sought declaratory relief establishing that LIRR employees are covered by the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, and accordingly possess the right to strike established therein. Petitioner also sought injunctive relief barring enforcement of New York's "Taylor Law," N.Y. Civ. Serv. Law § 200 *et seq.* (McKinney 1973 & Supp. 1980), which prohibits public employee strikes, on the ground that the RLA preempts the state law. The district court granted summary judgment to petitioner (Pet. App. 29a-46a) but the court of appeals reversed (Pet. App. 1a-25a), holding that application of the RLA to secure the right to strike to the LIRR's employees is inconsistent with the Tenth Amendment.

1. The LIRR is a common carrier providing service to five counties within the New York metropolitan area. The railroad was founded in the early nineteenth century and remained in private hands until 1966, when its stock was acquired by an agency of the State of New York from the Pennsylvania Railroad. The LIRR is now owned and operated by the MTA, also an entity of state government.

The LIRR is predominantly a commuter railroad, providing passenger service between Nassau and Suffolk

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[1] Although the constitutionality of provisions of the Railway Labor Act, as applied to the Long Island Railroad, was "drawn in question" in this case, neither the district court nor the court of appeals certified this fact to the Attorney General, as required by 28 U.S.C. 2403, so as to permit intervention by the United States.

counties, outside New York City, and the railroad's western terminus in Manhattan, in New York City. The most distant point served by the LIRR, however, is more than a hundred miles from Manhattan, and such a journey takes about three hours. In addition to passenger service, the LIRR provides a modest amount of freight service and is the only carrier of freight by rail within its service area. As a freight carrier, the LIRR participates in interstate commerce by interchange of freight cars with other connecting carriers (Pet. App. 3a-4a, 10a, 34a-35a; see also *Moody's Transportation Manual* 682-684 (1980)).

As a result of its participation in interstate freight shipments, the LIRR is a carrier within the meaning of the Interstate Commerce Act, 49 U.S.C. (Supp. III) 10501(a); *Brotherhood of Locomotive Engineers* v. *Staten Island Rapid Transit Operating Auth.*, Finance Dkt. No. 29011 (ICC Nov. 8, 1979). The railroad has historically considered itself subject to the Interstate Commerce Act, filing reports thereunder, and to other federal railroad legislation applicable to such carriers, including the Railway Labor Act (Pet. App. 10a, 35a-36a).[2] Indeed, the LIRR invoked the collective bargaining and mediation procedures of the National Mediation Board (NMB) in the very labor dispute that led to this litigation (*id.* at 36a).

2. Petitioner commenced this action in the United States District Court for the Eastern District of New York on December 7, 1979, at a time when the collective bargaining and mediation procedures prescribed by the RLA for resolution of the labor dispute between its members and the railroad were about to be exhausted.[3] The

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[2] The entire operation of the LIRR is subject to the RLA by virtue of its status as a carrier within the meaning of the Interstate Commerce Act. 45 U.S.C. 151.

[3] The procedures of the Railway Labor Act were summarized in *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969):

> The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect

following day, UTU members began a strike against the LIRR. On December 14, pursuant to the NMB's certification that the strike "threaten[ed] substantially to interrupt interstate commerce to a degree such as to deprive • • • [a] section of the country of essential transportation," the President established an Emergency Board pursuant to the RLA, 45 U.S.C. 160, thereby triggering a "cooling off" period of up to 60 days (Pet. App. 4a, 30a-31a).

The LIRR employees thereupon returned to work. On January 17, 1980, respondents moved to dismiss this action for want of a justiciable "case or controversy," noting that the LIRR, despite its acquisition by the MTA, remained organized as a private stock corporation, the employees of which were not, as a matter of state law, covered by the Taylor Law. See N.Y. Pub. Auth. Law § 1265(9)(a) (McKinney 1970); N.Y. Civ. Serv. Law §§ 201(6)(a), (7)(a) and (8), and 210(1) (McKinney 1973 & Supp. 1980). Respondents argued that the Taylor Law was inapplicable on its face and asserted that they had no intention of invoking it (Pet. App. 31a).

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a change of rates of pay, rules, or working conditions must give advance written notice. § 6 [45 U.S.C. 156]. The parties must confer, § 2 Second [45 U.S.C. 152 Second], and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First [45 U.S.C. 155 First]. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7 [45 U.S.C. 155 First, 157]. If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President," who may create an emergency board to investigate and report on the dispute. § 10 [45 U.S.C. 160]. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10 [45 U.S.C. 152 Seventh, 155 First, 156, 160].

Three weeks later, however, as the end of the "cooling off" period approached, respondents changed their posture completely by reorganizing the LIRR as a public benefit subsidiary corporation of the MTA, thereby bringing the railroad's employees within the coverage of the Taylor Law. See N.Y. Pub. Auth. Law § 1265(9)(a) (McKinney 1970). Petitioner then sought, but was denied, a temporary restraining order barring enforcement of the Taylor Law against its members. The next day, February 13, 1980, the LIRR brought suit in state court under the Taylor Law, seeking an injunction against resumption of the strike (Pet. App. 31a).[4]

3. The district court granted petitioner's motion for summary judgment (Pet. App. 29a-46a). Relying on factual statements in the LIRR's own papers, the court determined at the outset that the LIRR is a carrier subject to the RLA (*id.* at 33a-36a). Citing *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969), *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964), and *California* v. *Taylor*, 353 U.S. 553 (1957), the court concluded that the RLA secured the right to strike to the LIRR's employees, notwithstanding contrary state law and the state's ownership of the railroad (Pet. App. 36a-39a). The court characterized the Taylor Law's "abridgement of the right to strike * * * [as] a direct assault upon the heart of the federal scheme of labor relations in the railway industry" and held that the Supremacy Clause barred its application to petitioner's members (*id.* at 39a).

The district court also rejected the LIRR's contention that the Tenth Amendment, as construed in *National*

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[4] Petitioner removed the state court action to the United States District Court for the Southern District of New York and then sought to have it transferred to the Eastern District federal court to be consolidated with the instant case. Instead, the Southern District federal court remanded the case to state court (Pet. App. 32a).

League of Cities v. *Usery*, 426 U.S. 833 (1976), precluded application of the RLA to a state-owned railroad. The court noted that this Court in *National League of Cities* had affirmed the continuing validity of *United States* v. *California*, 297 U.S. 175 (1936), and *California* v. *Taylor*, *supra*, which had upheld the assertion of federal authority over state railroads, and it distinguished commuter rail service from the state activities canvassed in *National League of Cities* (Pet. App. 38a n.4).[5]

4. The court of appeals reversed (Pet. App. 1a-25a). The court of appeals agreed with the district court that the RLA is applicable to the LIRR (*id.* at 8a-10a) and that application of the RLA, if constitutional, would preempt the Taylor Law's strike prohibition (*id.* at 10a, 24a). The court of appeals concluded, however, that application of the RLA to vest LIRR workers with the right to strike violates the Tenth Amendment as construed in *National League of Cities*. The court employed a three step analysis (*id.* at 11a-13a), extracted from the Court's opinion and Justice Blackmun's concurring opinion in *National League of Cities*, inquiring: (1) whether application of the RLA would displace "essential government decisions" (*id.* at 13a-15a), (2) whether the operation of the LIRR is an "integral government function" (*id.* at 15a-22a), and (3) whether the federal government's interest in application of the RLA is

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[5] Although the district court granted the requested injunction against prosecution of the pending state court action to enforce the Taylor Law, it also enjoined any strike by petitioner's members pending respondents' appeal, so as to preserve the status quo in all respects (Pet. App. 45a). The court held (*id.* at 39a-45a) that the Anti-Injunction Act, 28 U.S.C. 2283, did not apply because injunctive relief was necessary to effectuate the court's judgment. This issue, which was not addressed by the court of appeals, is not before this Court.

The labor dispute that gave rise to this action was settled on April 11, 1980, prior to oral argument before the court of appeals (Pet. App. 6a n.6).

"demonstrably greater" than the state's interest in avoiding strikes (*id.* at 22a-25a).

The court of appeals first held that the RLA necessarily "displaces the State's ability * * * to make essential governmental decisions" because "[i]n enacting the Taylor Law, New York State made a determination that in order to protect the public it must assure the orderly and uninterrupted operations and functions of government by prohibiting strikes by public employees" and because the Taylor Law is "a key provision in the state's legislative effort to provide its citizens with continuous public transportation" (Pet. App. 14a). The court also noted the adverse effect a strike would have on the economy of the New York metropolitan area and the increased leverage the right to strike provides workers in wage negotiations, concluding that application of the RLA "deprives the States of the right to make 'fundamental employment decisions' that are essential to their 'separate and independent existence'" (*id.* at 15a, quoting *National League of Cities, supra*, 426 U.S. at 851).

Second, notwithstanding the Court's refusal in *National League of Cities* (426 U.S. at 854 n.18) to overrule *United States* v. *California*, which upheld application of the federal Safety Appliance Act to California's publicly-owned State Belt Railroad, the court of appeals concluded that the operation of the LIRR constitutes an "integral government function." The court below distinguished *United States* v. *California* on the ground that California's State Belt Railroad provided only freight service, whereas the "local passenger transportation" provided by the LIRR had, in the court's view, "come to be supplied primarily by state and local governments" (Pet. App. 17a; footnote omitted). The court remarked that passenger transportation is a service "that the state and local governments are particularly suited to provide because of the community-wide need," a service "they have come to provide by a process of economic elimination of private suppliers," and a service "of much more importance to the

public, in several respects, than was the state-operated freight line in *United States* v. *California, supra*" (*id.* at 18a). The court thus held that the scope of state and local government services shielded from federal legislation by the Tenth Amendment is not limited to the traditional range of governmental functions (*id.* at 18a-22a), but is instead dependent on the current "importance of a public service" (*id.* at 18a).

Finally, the court of appeals concluded (Pet. App. 22a-25a) that the federal interest in application of the RLA to the LIRR is not "demonstrably greater" than the state's countervailing interest in preventing strikes. This conclusion rested on two observations: first, that the ultimate purposes—*i.e.*, maintenance of labor peace and continuity of service—of the Taylor Law and the RLA are consistent,[6] and second, that New York has a greater interest in resolution of disputes affecting the LIRR's commuter service than does the United States.[7]

5. Subsequent to this Court's grant of certiorari to review the court of appeals' decision in this case, Congress enacted amendments to the Railway Labor Act that directly affect the analysis of the issue presented. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, Section 1157, *reprinted in* 127 Cong. Rec. H5532 (daily ed. July 29, 1981). These amendments, which are designed to "provide for public accountability in labor disputes involving publicly operated commuter service" (H.R. Rep. No. 97-153, 97th Cong., 1st Sess. 3

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[6] The court of appeals observed that the Taylor Law preserves the right of collective bargaining secured by the RLA, and it remarked that the conflict between the two schemes is thus much less acute than that at issue in *California* v. *Taylor, supra*, where the state law prohibiting strikes was labeled by this Court (353 U.S. at 560) as the "antithesis" of the RLA (Pet. App. 24a).

[7] The court of appeals acknowledged (Pet. App. 24a) that the "federal government has the prevailing interest in the operation of the LIRR's freight service," but it concluded that commuter service constitutes the predominant portion of the LIRR's operations.

(1981)),[8] add a new Section 9A to the RLA, the provisions of which substantially enhance the ability of publicly owned and operated commuter railroads to avoid interruptions of service stemming from labor disputes.[9]

The amendments provide that whenever the National Mediation Board is unable to resolve a labor dispute through the conciliation procedures prescribed by the RLA (see note 3, *supra*), the Governor of any state served by the carrier, the publicly owned commuter rail authority, or any union involved may request establishment of an Emergency Board to investigate and report upon the dispute. Section 9A(b). Upon receipt of any such request, the President is directed to appoint a board,

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[8] H.R. Rep. No. 97-153 accompanied H.R. 3559, 97th Cong., 1st Sess. (1981). Section 609 of that bill incorporated amendments to the RLA identical to those actually enacted as part of the Omnibus Budget Reconciliation Act of 1981. Compare H.R. Rep. No. 97-153, *supra*, at 36, 100, with 127 Cong. Rec. H5532 (daily ed. July 29, 1981). The legislative history of H.R. 3559 was incorporated by reference in the House version of the budget reconciliation bill, see H.R. Rep. No. 97-158, 97th Cong., 1st Sess., Vol. II, 438 (1981), and the House version of the budget reconciliation bill was, in this respect, ultimately adopted by the Conference Committee and enacted into law. See 127 Cong. Rec. S9065 (daily ed. July 31, 1981) (Conf. Rep.).

[9] The Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, Section 1135(a)(3), *reprinted in* 127 Cong. Rec. H5521 (daily ed. July 29, 1981), defines a "commuter authority" as

> any State, local, or regional authority, corporation, or other entity established for purposes of providing commuter service, * * * *includ[ing] the Metropolitan Transportation Authority* * * * any successor agencies, and any entity created by one or more such agencies for the purpose of operating, or contracting for the operation of, commuter service. [Emphasis added.]

The Act also provides (Section 1135(a)(4)) that

> "Commuter service" means short-haul rail passenger service operated in metropolitan and suburban areas, whether within or across the geographical boundaries of a State, usually characterized by reduced fare, multiple-ride, and commutation tickets, and by morning and evening peak period operations.

unless he has already done so in the exercise of his discretionary power in response to a report by the NMB, as provided under the long-standing procedures of the RLA, 45 U.S.C. 160 (see page 4 and note 3, *supra*). Section 9A(b) and (c). Once an Emergency Board is created, whether at the request of an interested party or the Governor, or in the exercise of the President's discretion, no strike is permitted during the ensuing 120 days. Section 9A(c)(1) and (2).[10] As in the case of other rail disputes, the Emergency Board is directed to render its report regarding a labor dispute involving a publicly owned and operated commuter authority within 30 days. See 127 Cong. Rec. S9065 (daily ed. July 31, 1981) (Conf. Rep.); 45 U.S.C. 160. However, when 60 days have elapsed from the creation of the Emergency Board, without resolution of the dispute, instead of allowing a strike to commence (see note 10, *supra*) the amendments require the NMB to conduct a public hearing at which each party to the dispute must justify its failure to abide by the Emergency Board's settlement recommendations. Section 9A(d).

The new statute also provides that any party to the dispute, or the Governor of a state served by the commuter carrier, may secure, upon request, appointment of a second Emergency Board, when the initial 120-day "cooling off" period expires without a settlement. Section 9A(e). Thereafter, each party is required to submit a final statement of proposed terms for settlement within 30 days, and the second board is directed to report to the President, in another 30 days, its selection of the most reasonable offer. Section 9A(f) and (g). During this process and for 60 days thereafter no strike is permitted. Section 9A(h). Thus the "cooling off" period may last as

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[10] Under the generally applicable provisions of the RLA, the period during which "no change, except by agreement, shall be made by the parties to the controversy" extends from the creation of the Emergency Board through 30 days after it has rendered its report—a maximum of 60 days overall. 45 U.S.C. 160.

long as 240 days beyond the end of the NMB's mediation procedures.

The 1981 amendments provide substantial incentives to each party to accept the proposal determined to be most reasonable by the second Emergency Board. Should the union strike after refusing to accept the carrier's offer, selected as most reasonable by the board, its members are denied benefits under the Railroad Unemployment Insurance Act for the duration of the strike. Section 9A(i). Conversely, if it is the carrier's refusal to yield that prevents a settlement, the carrier is precluded from taking advantage of any mutual assistance agreement among rail carriers. Section 9A(j).

SUMMARY OF ARGUMENT

The application of the Railway Labor Act to vest employees of the LIRR with the right to strike in certain narrow circumstances does not violate the Tenth Amendment. In *National League of Cities* v. *Usery*, 426 U.S. 833, 845, 852 (1976), this Court held that federal legislation enacted pursuant to the Commerce Clause ordinarily may not "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" so as to deprive a state of "functions essential to separate and independent existence." Although the Court did not exhaustively catalogue the protected state functions, it identified one function as unprotected—the operation of a railroad engaged in common carriage in interstate commerce. *Id.* at 854 n.18. The decision below disregards this guidance.

A. Operation of a common carrier such as the Long Island Railroad is not a traditional function of state government. The railway industry in the United States has historically been (and still remains) the domain of private enterprise, and as such has been the subject of comprehensive federal regulation for over a century. This regulatory framework has been consistently upheld by this Court as a permissible exercise of the commerce power, and the Railway Labor Act is a long-standing and integral part of the congressional scheme.

The LIRR represents no exception to the railroad industry pattern. Privately owned throughout most of its existence, the LIRR freely acknowledged that it was subject to federal legislation, including the RLA, applicable to railroads participating in interstate commerce, until it reversed its position in the course of litigating this case. In these circumstances, the expansion of state activities to encompass the operation of the LIRR cannot insulate the railroad's employees from the protections granted by Congress in the RLA.

In reaching a contrary conclusion, the court of appeals relied on the erroneous perception that the service provided by the LIRR is of a kind provided almost exclusively by publicly owned and operated carriers. But the court failed to recognize that the LIRR, despite the evolving character of its operations, remains a railroad—an integral part of the interstate railroad industry and plainly distinguishable from conventional intraurban transit systems.

B. The Railway Labor Act does not, in any event, displace fundamental state decisions. Unlike the Fair Labor Standards Act, considered in *National League of Cities*, the RLA imposes no substantive requirements upon state entities. Rather, it merely prescribes a set of procedures, applicable throughout the railroad industry, that are designed to resolve labor disputes amicably and to avoid work stoppages detrimental to interstate commerce.

Moreover, the purposes of the RLA are fully consistent with the State's Taylor Law, and many of the provisions of the two schemes are similar. Although the RLA protects the right to strike denied by state law, it requires exhaustion of "interminable" procedures (*Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969)) before that right may be exercised. Indeed, this Court has recognized that the scheme prescribed by the RLA is generally a more effective means of avoiding interruptions in rail service than state law prohibitions upon strikes. *California* v. *Taylor*, 353 U.S. 553, 566

(1957). Accordingly, the RLA effects little, if any, meaningful intrusion upon state decision-making. Any intrusive effect has been further reduced by the recent amendments to the RLA, which vest publicly owned and operated commuter railroads, including the LIRR, with the right to invoke a "cooling-off" period of as much as 240 days after the exhaustion of mediation processes, during which no strike may occur, and which provide additional incentives for avoidance of work stoppages.

ARGUMENT

APPLICATION OF THE RAILWAY LABOR ACT TO EMPLOYEES OF THE LONG ISLAND RAILROAD DOES NOT VIOLATE THE TENTH AMENDMENT

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Court held that the 1974 amendments to the Fair Labor Standards Act (FLSA) applying the minimum wage, overtime pay and maximum hour provisions of that Act to "almost all public employees employed by the States and by their various political subdivisions" (*id.* at 836) were unconstitutional. Observing that "[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime" (*id.* at 845), the Court noted that the 1974 FLSA amendments "directly supplant[] the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment." *Id.* at 848. The Court accordingly concluded that "the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" (*id.* at 852) and to deprive the states of " 'functions essential to separate and independent exist-

ence'" (*id.* at 845, quoting *Coyle* v. *Oklahoma*, 221 U.S. 559, 580 (1911), and *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)), thereby "'impair[ing] the States' integrity or their ability to function effectively in a federal system'" (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 843, quoting *Fry* v. *United States*, 421 U.S. 542, 547 n.7 (1975)). Congress was barred by the Tenth Amendment from exercising its plenary power under the Commerce Clause in such circumstances, lest "'the National Government * * * devour the essentials of state sovereignty.'" 426 U.S. at 855, quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting).

Just last Term the Court recapitulated the holding of *National League of Cities* in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, No. 79-1538 (June 15, 1981). The Court stated (slip op. 21 (footnote omitted; emphasis in original)):

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.* at 845. And third, it must be apparent that the States' compliance with federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Id.* at 852.

Even when these three requirements are met, a Tenth Amendment challenge to legislation under the Commerce Clause will sometimes fail, the Court noted, because "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies State submission." *Virginia Surface Mining & Reclamation Association*, *supra*, slip op. 21 n.29.

In our view, application of the foregoing principles to the facts of this case reveals that the court of ap-

peals' decision constitutes an unwarranted extension of the holding in *National League of Cities*. Operation of a railroad such as the LIRR is not an essential attribute of state sovereignty, and the Railway Labor Act, especially as recently amended, does not displace the State of New York's freedom to structure integral operations in areas of traditional governmental functions. Moreover, whatever minimal intrusion on matters of state sovereignty that may be perceived in the RLA is justified by the compelling and well-established federal interest in maintaining a proven mechanism for assuring labor peace and continuity of service on interstate rail carriers. In sum, the application of the RLA in the circumstances of this case cannot be said to impair the ability of the State of New York to "function effectively in a federal system." *National League of Cities, supra*, 426 U.S. at 852, quoting *Fry* v. *United States, supra*, 421 U.S. at 547 n.7.

A. The Operation of the Long Island Railroad Does Not Constitute a Traditional Governmental Function

1. In overruling *Maryland* v. *Wirtz, supra*, which had upheld the constitutionality of the 1966 amendments to the FLSA bringing employees of government hospitals and schools within the ambit of that Act, the Court in *National League of Cities, supra*, specified that the publicly operated "schools and hospitals involved in *Wirtz* * * * each provide[] an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." 426 U.S. at 855 (footnote omitted).[11] The Court also listed

[11] In addition to schools and hospitals, the 1966 amendments to the FLSA expanded that Act's coverage to employees performing activities in

> the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such

"such areas as fire prevention, police protection, sanitation, public health, parks and recreation" as other examples of traditional "integral" state functions. *Id.* at 851, 855. However, the Court did not purport to offer "an exhaustive catalogue of [those] * * * activities which are well within the area of traditional operations of state and local government," and that accordingly may not be subject to federal commerce power legislation, providing other elements of the test announced by the Court are satisfied. *Id.* at 851 n.16.

Although the Court thus left unsettled the status of federal regulation affecting a broad range of state governmental functions (see, *e.g.*, *National League of Cities* v. *Marshall*, 429 F. Supp. 703, 705-706 (D.D.C. 1977) (three-judge court), on remand from *National League of Cities*), it did single out one activity as outside the scope of the Tenth Amendment's protection: a state's "operation of a railroad engaged in 'common carriage by rail in interstate commerce * * *.'" *National League of Cities, supra*, 426 U.S. at 854 n.18, quoting *United States* v. *California*, 297 U.S. 175, 182 (1936). The Court commented that "California's activity [in operating a railroad] was not in an area that the States have regarded as integral parts of their governmental activities." 426 U.S. at 854 n.18.

The Court added (426 U.S. at 854 n.18) that "[f]or the same reasons * * * the holdings in *Parden* v. *Terminal Ry. Co.*, 377 U.S. 184 (1964), and *California* v. *Taylor*, 353 U.S. 553 (1957), are * * * unimpaired by our decision today." In *California* v. *Taylor*, *supra*, the Court upheld application of the RLA to a state-owned railroad so as to vest its employees with collective bar-

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railway or carrier is public or private or operated for profit or not for profit) * * *.

29 U.S.C. 203(r)(2). The states did not challenge this aspect of the 1966 amendments in *Maryland* v. *Wirtz*, *supra*, nor was it addressed by the Court in *National League of Cities* in overruling *Wirtz*. See 426 U.S. at 855.

gaining rights denied them by state law, notwithstanding the State's contention that this worked a denial of state sovereignty. And in *Parden* v. *Terminal Ry., supra*, the Court held that a state-owned railroad was subject to suit in federal court on a claim under the Federal Employers' Liability Act, notwithstanding the Eleventh Amendment. In each instance the Court recognized that by "leav[ing] the sphere that is exclusively its own and enter[ing] into activities subject to congressional regulation [the State] subjects itself to that regulation * * *." 377 U.S. at 196; see also *California* v. *Taylor, supra*, 353 U.S. at 568. These decisions, reaffirmed in *National League of Cities*, control this case, and require reversal of the decision of the court of appeals.

2. As the Court stated in *National League of Cities*, operation of a railroad participating in interstate commerce has not traditionally been regarded as a government function. Indeed, until quite recently, the operation of railroads in the United States has been reserved, with minor exceptions (such as terminal freight railroads), to private enterprise. *California* v. *Taylor, supra*, 353 U.S. at 563-564. Nearly commensurate with the long-standing tradition of private railway ownership and operation is the record of federal regulation of the operations of rail carriers—regulation consistently upheld by this Court as within Congress' power under the Commerce Clause. See, *e.g.*, *Napier* v. *Atlantic Coast Line*, 272 U.S. 605 (1926) (Boiler Inspection Act); *Southern Ry.* v. *Railroad Commission of Indiana*, 236 U.S. 439 (1915) (Safety Appliance Act); *Houston & Texas Ry.* v. *United States*, 234 U.S. 342 (1914) (Interstate Commerce Act); *Erie R.R.* v. *New York*, 233 U.S. 671 (1914) (Hours of Service Act); *Second Employers' Liability Cases*, 223 U.S. 1 (1912) (Employers' Liability Act of 1908); *Baltimore & Ohio R.R.* v. *ICC*, 221 U.S. 612 (1911) (Hours of Service Act). The Railway Labor Act itself, enacted in 1926 and substantially

amended in 1934, "evolved from legislative experimentation beginning in 1888." *California* v. *Taylor*, *supra*, 353 U.S. 557-559 & n.3.[12] Accordingly, the Court's oftenreaffirmed conclusions that by undertaking to operate a railroad participating in interstate commerce, a state subjects itself to federal regulation of such carriers, and that such regulation does not detract from the essential attributes of state sovereignty, are firmly anchored in the historical development of the railroad industry and the applicable law. By acquiring the LIRR, a carrier subject to the RLA, the State of New York accordingly assumed the obligations of a carrier under that Act.

Consideration of the history of the LIRR provides substantial support for the conclusion that operation of the railroad is neither a traditional function of the State of New York nor an essential attribute of state sovereignty. The LIRR was incorporated in 1834 and entered service in 1844. *Moody's Transportation Manual* 682 (1980). It was not until a century later, in 1966, that the LIRR was acquired by the Metropolitan Commuter Transportation Authority, predecessor to the respondent MTA, from the LIRR's corporate parent, the former Pennsylvania Railroad Company. *Ibid.* Thus, the LIRR has been an instrumentality of the State for only the most recent fraction of its history. It accordingly cannot be considered "within the area of traditional operations of state [or] local governments." *National League of Cities*, *supra*, 426 U.S. at 851 n.16, 852.

A striking indication of the fact that New York did not consider operation of the LIRR to be an integral

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[12] The RLA applies to carriers covered by the Interstate Commerce Act. 45 U.S.C. 151 First. The definition of carrier embodied in the Interstate Commerce Act today, 49 U.S.C. (Supp. III) 10501(a), is traceable to Section 1 of the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379. See *California* v. *Taylor*, *supra*, 353 U.S. at 564 n.10. The latter enactment was a seminal exercise of Congress' commerce power; the subject of the legislation, of course, was the railroad industry.

government function is that, until the reorganization of the LIRR for the purposes of this very lawsuit (see pages 4-5, *supra*), employees of the LIRR were not, as a matter of state law, deemed "public employees." Compare N.Y. Pub. Auth. Law § 1265 (9) (a) (McKinney 1970) with N.Y. Civ. Serv. Law § 201(6) (a), (7) (a) and (8) (McKinney 1973 & Supp. 1980).[13] Indeed, as the district court noted (Pet. App. 31a, 36a), the LIRR has historically regarded itself as subject to the RLA,[14] has participated in and invoked the processes of the Act and the NMB throughout the period of MTA ownership,

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[13] The cited provision of the Public Authorities Law, specifically addressed to the MTA, states:

> Notwithstanding any provisions of the Civil Service Law, no officer or employee of a subsidiary corporation of the authority, other than a public benefit subsidiary corporation, shall be a public officer or a public employee.

In the absence of this provision, it appears that LIRR employees would be deemed public employees under the cited provisions of the New York Civil Service Law. And employees of the MTA itself, who are not employees of its subsidiary railroad corporation, have always been considered public employees subject to the Taylor Law. N.Y. Civ. Serv. Law § 201(6) (a), (7) (a), and (8). Finally, New York law provides that LIRR employees are not to be deemed employees of the MTA. Pub. Auth. Law § 1266(5) (McKinney 1970).

[14] In *Long Island R.R.* v. *Department of Labor*, 256 N.Y. 498, 515-517, 177 N.E. 17, 23-24 (1931), cited with approval in *California* v. *Taylor*, *supra*, 353 U.S. at 561 n.9, the Court of Appeals of the State of New York sustained the railroad's claim that the Railway Labor Act precludes application of state wage and hour legislation to its employees. The Court of Appeals observed that the RLA (256 N.Y. at 516-517, 177 N.E. at 24):

> provides a method for fixing wages of employees by free contract or adjustment of labor disputes. * * * Its purpose of ending labor disputes may be thwarted by any regulation of the State compelling payment of wages to "employees" at a different rate. It seems to us clear that Congress intended to exclude any interference by any State in the field of wages of employees of interstate carriers.

and continued to do so during the dispute that gave rise to this lawsuit, even after this action was commenced. It was only when the 60-day "cooling off" period provided by the then-applicable provisions of the RLA was about to expire that the MTA reorganized the LIRR as a public benefit subsidiary corporation, the employees of which are covered by the Taylor Law (see note 13, *supra*). In these circumstances the LIRR cannot be considered an integral, much less a traditional, function of state or local government.

3. The court of appeals declined to follow *United States* v. *California*, *supra*, despite the reaffirmation of the soundness of its result in *National League of Cities*. In distinguishing *California*, the court below relied on the fact that the State Belt Railroad provided only freight service, whereas the LIRR provides commuter passenger transportation, which, according to the court, "is now of necessity provided almost exclusively by state and local governments" (Pet. App. 17a). The court concluded that operation of the LIRR is an integral government function, based upon the observations that "it is a service that the state and local governments are particularly suited to provide because of the community-wide need" and that "the LIRR's passenger service is of much more importance to the public, in several respects, than was the state-operated freight line in *United States* v. *California*" (Pet. App. 18a).

The court of appeals' analysis is fundamentally flawed in several respects. First, the court failed to appreciate that invalidation of the RLA as applied to the LIRR requires a showing that the RLA addresses "matters that are indisputably 'attributes of state sovereignty' " within " 'areas of traditional functions.' " *Hodel* v. *Virginia Surface Mining & Reclamation Association*, *supra*, slip op. 21, quoting *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 845, 852. Neither test is satisfied here. When a state undertakes activities in commerce that are the "subject [of] congressional regulation," outside the traditional state governmental "sphere that is exclusively its

own," it "subjects itself to that regulation." *Parden* v. *Terminal Ry., supra*, 377 U.S. at 196. Thus, the court of appeals erred in assuming (Pet. App. 16a) that any important activity undertaken by state or local government upon the failure of private enterprise becomes an integral attribute of sovereignty that may not be the subject of federal regulation.[15]

Although the "catalog of essential state-provided services" may well, as the court of appeals declared, not be "static" (Pet. App. 16a), the importance of a subject of regulation to the state and its citizens is not in itself sufficient to establish an immunity from federal legislation. *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 397-398 (1951). It may well be that changing circumstances at times provide a sufficient basis for characterizing a non-traditional activity as an integral attribute of state sovereignty insulated against Acts of Congress that displace fundamental state decisions. But when a state government elects to expand its operations into a field that is not new, but is merely new to government, and that has long been subject to federal regulation pursuant to core aspects of the commerce

[15] The courts of appeals have held that state prisons, see *Wentworth* v. *Solem*, 548 F.2d 773 (8th Cir. 1977), and licensing and supervision of local highways, see *Peel* v. *Florida Dep't of Transportation*, 600 F.2d 1070 (5th Cir. 1979), are integral state functions. These functions traditionally have been performed by local governments, and there exists a general expectation among citizens that the municipality or state will continue to perform them. On the other hand, oil and gas production, see *Public Service Co. of North Carolina, Inc.* v. *FERC*, 587 F.2d 716 (5th Cir.), cert. denied, 444 U.S. 879 (1979), and telephone service, see *Puerto Rico Telephone Co.* v. *FCC*, 553 F.2d 694 (1st Cir. 1977), have been held not to be traditional or integral state government functions. But see *State of Mississippi* v. *FERC*, No. J79-0212(c) (S.D. Miss. Feb. 19, 1981), prob. juris. noted, No. 80-1749 (June 15, 1981). While performance of the latter functions is undoubtedly important to the particular community or state involved, these services are regularly performed by private entities. Thus, there is no tradition or widespread expectation that states will provide them.

power, it cannot thereby acquire a Tenth Amendment immunity for the commercial activity undertaken.[16]

This case is readily distinguishable from *National League of Cities* in this respect. There, the Court considered the constitutionality of amendments to the FLSA that eliminated a long-standing exemption from the Act's coverage for state and local governments (see 426 U.S. at 836 & n.6), thereby thrusting the federal government into a regulatory role affecting fundamental and traditional functions of the states. Here, the situation is just the reverse. The State has deliberately assumed a role with scant historical precedent, placing itself in an industry that has been comprehensively regulated by the United States for nearly a century. Perhaps no other industry has been subjected to such prolonged and per-

[16] In *Amersbach* v. *City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979), cited with approval by the court of appeals (Pet. App. 16a), the court held that municipal employees serving at a city-owned airport may not be covered by the FLSA. The Sixth Circuit abstracted four defining characteristics of the functions listed as protected ones in *National League of Cities*:

> (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a community-wide need for the service or activity.

598 F.2d at 1037. While we consider this enumeration incomplete in some respects, we note that the result reached by the Second Circuit in this case is inconsistent with this formulation. Service on the LIRR is not "available to the public at little or no direct expense," as is an airport to all travelers. Rather, the railroad is operated on a fee for service basis, and fares collected fund a major share of operating costs. See *Moody's Transportation Manual* 682 (1980). Nor is the ridership of the LIRR, although substantial, significant in comparison to the overall population of the area served (see Pet. 6). See also pages 24-29, *infra*. These attributes underscore the similarity between the LIRR and other commercial activities that are subject to federal commerce power legislation.

vasive federal supervision under the commerce power. Moreover, as this Court has noted, the RLA is the product of a unique industry-wide agreement upon a governing scheme for labor relations in the rail industry (*California* v. *Taylor*, *supra*, 353 U.S. at 557-558) and represents an

> instrument of industry-wide government. * * * The railroad world for which the Act was designed has been described as "a state within a state. Its population * * * lives according to rules of its own making * * *. This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been firmly established." Garrison, the National Railroad Adjustment Board; A Unique Administrative Agency, 46 Yale L. J. 567, 568-569 (1937).[17]

353 U.S. at 565-566 (citation omitted). Thus, whatever the rule might be in other instances in which a state or local government assumes a function formerly performed by private enterprise, the operation of a railroad by such a government entity cannot be regarded as an "integral operation[] in [an] area[] of traditional governmental functions," essential "to a separate and independent existence" or to the "States' ability to function effectively in a federal system." *National League of Cities*, *supra*, 426 U.S. at 845, 852, quoting *Lane County*

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[17] The Court in *Taylor* noted that "[b]argaining collectively * * * has often taken on a national flavor * * *." 353 U.S. at 567. Respondents assert (Br. in Opp. 5) that petitioner and other unions representing LIRR employees do not adhere to this tradition. Even if this is so—a question not addressed by either court below—the Court's statement (353 U.S. at 567) that

> Congress no doubt concluded that a uniform method of dealing with the labor problems of the railroad industry would tend to eliminate inequities, and would promote a desirable mobility within the railroad labor force[,]

remains valid.

v. *Oregon*, *supra*, 74 U.S. (7 Wall.) at 76, and *Fry* v. *United States*, *supra*, 421 U.S. at 547 n.7.[18]

The court of appeals' decision also rests on a mistaken perception of the nature of the Long Island Railroad, which (even setting to one side the LIRR's freight service and longest passenger runs) is a commuter railroad,

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[18] "[B]y engaging in the railroad business a State cannot withdraw the railroad from the power of the federal government to regulate commerce." *Parden* v. *Terminal Ry.*, *supra*, 377 U.S. at 192 n.10, quoting *New York* v. *United States*, 326 U.S. 572, 582 (1946) (opinion of Frankfurter, J.); see also *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 424 (1978) (opinion of Burger, C.J.) ("[T]he running of a business enterprise is not an integral operation in the area of traditional government functions."); cf. *Ball* v. *James*, No. 79-1740 (Apr. 29, 1981), slip op. 10-11. *New York* v. *United States*, *supra*, was one of a series of decisions by this Court upholding the application of the federal taxing power to state enterprises that are outside of the traditional scope of governmental functions. See *Massachusetts* v. *United States*, 435 U.S. 444, 457 (1978) (opinion of Brennan, J., collecting cases). In *National League of Cities*, the Court rejected the earlier reasoning of *United States* v. *California*, *supra*, to the effect that "the activities in which the states have traditionally engaged [which have been held to] mark[] the boundary of the restriction upon the federal taxing power" do not supply a like "limitation upon the plenary power to regulate commerce." 426 U.S. at 854, quoting 297 U.S. at 185. But nothing in *National League of Cities* suggests that the power to regulate commerce is *more* limited than the power to tax. See 426 U.S. at 843-844 n.14. And in *Helvering* v. *Powers*, 293 U.S. 214 (1934), this Court held that the Board of Trustees of the Boston Elevated Railway Company, a quasi-public street railway enterprise, could not share in the intergovernmental tax immunity of the State of Massachusetts. The Court's reasoning in *Powers* (*id.* at 227) is fully applicable here:

> [T]he State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State. * * * [These circumstances] cannot be said to furnish a ground for immunity.

rather than a conventional public mass transit system.[19] This mischaracterization caused the court of appeals to rely upon the erroneous premise that the LIRR provides service of a kind that "is now of necessity provided

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[19] This distinction, overlooked by the court below, is firmly grounded in the separate histories of these two sectors of the transportation industry, in the applicable law, and in the usages of the industry. A "commuter railroad" is defined by the American Public Transit Association (APTA) as

> [t]hat portion of "main-line railroad" (not "electric railway") transportation operations which encompasses urban passenger train service for local short-distance travel between a central city and adjacent suburbs; suburban rail passenger service—using both locomotive-hauled and self-propelled railroad passenger cars—is characterized by multi-trip tickets, specific station-to-station fares, railroad employment practices, and usually only one or two stations in the central business district.

Transit Fact Book 7 (1978-1979 ed.); see also note 9, *supra* (definition of commuter rail service applicable to RLA amendments in the Omnibus Budget Reconciliation Act of 1981). By contrast, a "transit system" is defined as

> [a]n organization providing intraurban common-carrier passenger service over at least one regular fixed route with a published time schedule, not including variable-route service, unscheduled service, or interurban service.

Transit Fact Book, supra, at 9. Transit systems include operation of bus systems as well as rapid transit, which represents

> [t]ransit vehicles operating over completely grade-separated private right-of-way. The term rail rapid transit, also known as "rapid rail transit," applies to both operation of light rail vehicles over exclusive private right-of-way and operation of heavy rail vehicles; the term bus rapid transit applies to operation of motor buses over exclusive bus roads ("rapid busways").

Ibid. Light rail and heavy rail rapid transit are defined respectively as

> [s]treet-type transit vehicle railway constructed on city streets, semiprivate right-of-way, and exclusive private right-of-way;

almost exclusively by state and local governments" (Pet. App. 17a).

> formerly known as "streetcar" ("trolley car") and "subway-surface" depending upon local usage or preference[,]

id. at 8, and

> [s]ubway-type transit vehicle railway constructed on exclusive private right-of-way with high-level platform stations; formerly known as "subway" or "elevated (railway)."

Ibid. Commuter railroads are also described by the APTA as providing "transportation to the distant suburbs of America's largest cities." *Id.* at 74. The APTA reports data on commuter railroads separately from that pertaining to transit systems. *Id.* at 3.

The RLA itself incorporates a distinction between rapid transit systems and commuter rail operations. Since its enactment, the RLA has exempted from its coverage "any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but * * * not * * * any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power." 45 U.S.C. 151 First; see Pet. App. 10a; compare 29 U.S.C. 203(r)(2) (1966 amendment to FLSA expanding its coverage to, *inter alia*, "street, suburban or interurban electric railway[s]"; see note 11, *supra*). In the courts below respondents contended unsuccessfully that if Congress had foreseen the future evolution of the LIRR, it would have excluded operations of its kind from the RLA. The court of appeals declined to interpolate such an exception into the Act, stating that "any change in the regulation of this type of rail carrier must be left to Congress" (Pet. App. 10a). Congress has now addressed this issue and has determined not to exempt employees of publicly-owned commuter railroads from the RLA (see pages 8-11, *supra*, and pages 34-35, *infra*).

As is reflected in the definitions and statutory provisions cited above, one important attribute of commuter railroads is their genesis as a part of the railroad industry, rather than as a form of intraurban transit. The LIRR typifies a commuter railroad in this respect. Throughout most of the railroad's history much of the territory served would have been considered far distant from the City of New York, and this remains true of some of the railroad's service area even today (see page 3, *supra*). Another special attribute of commuter carriers is the discount fare for multiple trips (see pages 9 note 9 and 25 note 19, *supra*). This convention reflects the hybrid character of the commuter carrier—the discount serves as a form of price competition to encourage usage by regular com-

The LIRR is one of 17 commuter railroads in operation in the United States. American Public Transit Association, *Transit Fact Book* 74 (1978-1979 ed.). Of the 17 systems, only two are publicly owned and operated [20]—

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muters, while at the same time allowing the railroads to recoup larger fares from the more casual or infrequent user.

In this case, we express no view as to whether conventional publicly-owned mass transit systems are to be regarded as "integral operations in areas of traditional government functions," essential to sovereignty, such that fundamental state decisions concerning such systems may not be overborne by an Act of Congress pursuant to the Commerce Clause.

[20] By contrast, there are over 1,000 transit systems in the United States. *Transit Fact Book, supra*, at 48. Although also a relatively recent development in most areas of the United States, public ownership and operation of conventional transit systems is substantially better established than is such operation of commuter railroads. In 1979 nearly half of these systems, including most of the largest ones, carrying a total of 91% of all transit passengers, were owned by public agencies. *Id.* at 55; see also *Urban Mass Transportation Act of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency* ("*UMTA Hearings*"), 88th Cong., 1st Sess. 313 (1963) (testimony of George W. Anderson). According to the APTA (*Transit Fact Book, supra*, at 55):

> Public ownership of transit is a recent development. While the first publicly-owned transit system in the United States began operation in 1904, by World War II only 35 street railways and motor bus systems—carrying 7% of America's transit riders—were publicly owned. The shift from private to public ownership accelerated in the post-war years with over 50% of transit riders carried by publicly owned transit systems in 1967 and 91% riding publicly owned transit by 1978.

The shift from private to public ownership of transit systems was especially rapid in the years following 1960. In 1960, only 64 of 1,251 operating transit systems were publicly owned. *UMTA Hearings, supra*, at 27 (testimony of Robert Weaver). These included many of the largest systems, however. *Id.* at 313 (testimony of George W. Anderson). Enactment of the Urban Mass Transportation Act of 1964, 49 U.S.C. 1601 *et seq.*, authorizing capital grants and operating assistance for public mass transit systems, has evidently assisted the development of public transit systems. The LIRR has also been a beneficiary of such grants. *Moody's Transportation Manual* 682 (1980).

the LIRR and the Staten Island Rapid Transit Operating Authority (SIRTOA), both by the respondent MTA. *Id.* at 75.[21] To be sure, at the end of 1979 four other commuter railroads were owned by a public agency—but these are operated by interstate carriers under contract with a governmental agency and their employees are not government employees. *Ibid.* The remaining railroads are owned and operated by interstate rail carriers. *Ibid.*[22] Thus, examination of the commuter sector of the railroad industry reflects, not that this form of service has progressively become an integral part of local government functions, but that it remains a part of the railroad industry and interstate commerce.[23] Although governmental entities are assuredly assuming a larger role in the maintenance of commuter rail service, the MTA is

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[21] SIRTOA was acquired by the MTA in 1971 from the City of New York, which in turn acquired it from the Baltimore & Ohio Railroad in 1970. *Moody's Transportation Manual, supra,* at 597-598; *Locomotive Engineers* v. *Rapid Transit Auth.*, 100 L.R.R.M. 3154, 3155 (E.D.N.Y. 1979). Unlike the LIRR (see pages 4-5 and 18-20, *supra*), SIRTOA apparently was organized as a public benefit subsidary corporation from the time of its acquisition by public agencies. *Ibid.*

[22] Every operator of a commuter railroad is a carrier subject to Interstate Commerce Commission jurisdiction. See *Transit Fact Book, supra,* at 75; *Moody's Transportation Manual, supra,* at 1, 26, 132, 504, 517, 576, 610, 642, 767, 891, 896, 1215, 1852. Indeed, all but one of the non-MTA commuter railroads is operated by a carrier rated as a Class 1 carrier by the Interstate Commerce Commission. *Moody's Transportation Manual, supra,* at a4. The LIRR is also so rated. *Ibid.* Such carriers have annual gross revenues of $50,000,000 or more. Class 1 carriers "operate 92 percent of the total railway mileage of the United States, employ 94 percent of the nation's railroad workers, and handle 97 percent of the railway freight traffic * * *." *Ibid.* The Consolidated Rail Corporation ("Conrail") operates six commuter railroads. *Transit Fact Book, supra,* at 75.

[23] Several commuter railroads actually provide interstate passenger service because of the location of the city that is the terminus of operations. See, *e.g.*, *Moody's Transportation Manual, supra,* at 1852 (Chicago South Shore & South Bend Railroad).

unique in that it actually operates commuter rail service with government employees. Accordingly, there is no foundation in fact for the court of appeals' conclusion that the LIRR's service is of a kind "provided almost exclusively by state and local governments" (Pet. App. 17a).

Finally, it is important to note that, in both its passenger and its freight operations, the LIRR constitutes an integral part of a nationwide rail transportation network.[24] As a freight carrier the LIRR inter-

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[24] The court of appeals relied (Pet. App. 17a-18a) on the fact that California's State Belt Railroad, considered in *United States* v. *California*, *supra*, provided only freight service. But nothing in that decision, or the decisions in *California* v. *Taylor*, *supra*, and *Parden* v. *Terminal Ry.*, *supra*, turned on the nature of the service provided. Moreover, as is explained in the text, the passenger operation of the LIRR does not render it essential to the State's sovereignty or an integral operation in an area of traditional government functions.

In any event, the court of appeals incorrectly assumed that passenger operations are matters of purely local interest, whereas freight operations are matters of purely federal interest, and that the two need only be weighed against each other to determine which is predominant. On the contrary, the State Belt Railroad undoubtedly was of vital importance to the economy of San Francisco. See *United States* v. *California*, *supra*, 297 U.S. at 181-182. At the same time, the federal interest, as announced in the Interstate Commerce Act, extends to passenger service as well as freight. See 49 U.S.C. (Supp. III) 10501(a), (b). The passenger operation of a railroad that is part of a national industry with a uniform scheme for handling labor disputes and that serves the Nation's commercial and financial center—New York City—is assuredly a subject of legitimate concern for Congress. The court of appeals' analysis is doubly flawed, because the fact that the State has a more focused interest in the commuter operation of the LIRR than does the United States (see Pet. App. 24a) cannot be controlling. The same could be said of California's State Belt Railroad, and indeed was said, without avail, of the privately-owned public utility at issue in *Bus Employees* v. *Wisconsin Board*, *supra*, 340 U.S. at 397-398.

We note, however, that the LIRR does provide substantial freight service in interstate commerce (Pet. App. 9a, 34a-35a). In addi-

changes cars with carriers serving shippers from all regions of the United States (Pet. App. 34a; J.A. 25). The court of appeals acknowledged that the "LIRR's freight service provides a crucial physical link with other interstate rail carriers in the movement of interstate rail freight" (Pet. App. 9a, 24a), but it unaccountably failed to recognize that the LIRR's passenger service plays a similar role. Like other commuter railroads (see note 19, *supra*), the LIRR funnels passengers from nearby and distant surburban areas into a single terminal location in the central business district of the city served —in this instance New York City's Pennsylvania Station. At Pennsylvania Station, however, the LIRR also connects with rail passenger lines serving the entire Nation, particularly the important Northeast Corridor. As an important part of a national rail transportation system, the LIRR is properly subject to the uniform national scheme governing railway labor disputes. Compare *National League of Cities*, *supra*, 426 U.S. at 856 (Blackmun, J., concurring); see *California* v. *Taylor*, *supra*, 353 U.S. at 567.

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tion, the role assumed by commuter passenger service in the LIRR's operations is unique among operators of commuter railroads. The remaining carriers derive the great majority of their business from freight operations. See *Moody's Transportation Manual*, *supra*, note 22. This marriage of commuter and freight operations in a single carrier, with a single labor force, renders the court of appeals' analysis unworkable.

B. The Railway Labor Act Does Not Intrude Significantly Upon Important State Decisions in the Management of the LIRR.

The court of appeals concluded that the application of the RLA to LIRR employees displaces "essential government decisions" because it overrules the State's prohibition of strikes and could result in higher wages as a result of the bargaining power conferred on employees by the preservation of the possibility of a strike (Pet. App. 14a-15a). Neither of these circumstances supports the decision below. Moreover, any merit that the court of appeals' conclusion may once have had has been eliminated by the recent amendments to the Railway Labor Act.

1. Unlike the Fair Labor Standards Act considered in *National League of Cities, supra*, 426 U.S. at 846-851, which imposes substantive requirements respecting the fundamental terms of employment, the Railway Labor Act places no substantive obligations on the respondent MTA as operator of the LIRR. Rather, the obligations imposed are procedural; the Act does not require a carrier to pay any particular wage or agree to any particular proposal in bargaining. Moreover, as the court of appeals acknowledged (Pet. App. 23a-24a), the ultimate objectives of the RLA and New York's Taylor Law are fully compatible,[25] and the provisions of state

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[25] The purposes of the RLA are (45 U.S.C. 151a; emphasis added):

> (1) *To avoid any interruption to commerce or to the operation of any carrier engaged therein*; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this [Act]; (4) *to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working condi-*

law parallel those of the RLA in some significant respects.[26]

Of course, the state and federal laws diverge on the key point at issue here—the right to strike—but this was equally true in *California* v. *Taylor*, *supra*, 353 U.S. at 559-561.[27] The right to strike preserved by the RLA, however, is far from absolute and is not an end in itself; on the contrary, it is a critical element of the RLA's carefully crafted scheme for preventing interruptions in rail service, pursuant to the overriding federal interest in assuring the uninterrupted flow of interstate commerce. *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 381 (1969) (see note 27, *supra*). As

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tions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions.

[26] The court of appeals inexplicably concluded that this circumstance tended to demonstrate the unconstitutionality of the RLA. This stands the proper analysis on its head. In order to succeed with a *National League of Cities* claim, the claimant must affirmatively show impermissible displacement of state prerogatives. *Hodel* v. *Virginia Surface Mining & Reclamation Association*, *supra*, slip op. 21.

[27] The court of appeals sought to distinguish *Taylor* (Pet. App. 24a) by observing that the state law there at issue conflicted with the RLA in more respects than does the Taylor Law. But this circumstance cannot support the court of appeals' distinction because, on the court's theory, *Taylor* sanctioned a more sweeping "intrusion" into state decision-making than that contemplated here. In any event, the district court correctly characterized the Taylor Law's "abridgement of the right to strike * * * [as] a direct assault upon the heart of the federal scheme of labor relations in the railway industry" (Pet. App. 39a). As the Court declared in *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 381 (1969) (emphasis in original):

> The Railway Labor Act's entire scheme for the resolution of major disputes would become meaningless if the States could prohibit the parties from engaging in *any* self-help.

the Court recognized in *California* v. *Taylor*, *supra*, 353 U.S. at 566 (footnote omitted), "[t]he fact that, under state law * * * employees * * * may have no legal right to strike reduces, but does not eliminate, the possibility of a work stoppage." Noting that "[i]t was to meet such a possibility that the [RLA's] 'reign of law' was established" (*ibid.*), the Court remarked that the Act has proven to be the most effective means available of preventing interruptions in rail services. *Ibid.*[28] Moreover, the mediation procedures prescribed by the RLA (see note 3, *supra*), which must be exhausted prior to resort to self help, have been characterized as "interminable." *Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969); see also *Railway Clerks* v. *Florida E.C. Ry.*, 384 U.S. 238, 246 (1966). Indeed, the Court has declared that "the major purpose of Congress in [enacting] the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Texas & N.O.R.R.* v. *Railway Clerks*, 281 U.S. 548, 565 (1930). Thus, application of the RLA to the LIRR would not "directly impair" the State's ability to structure operations or make fundamental decisions affecting the railroad.[29]

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[28] The NMB reports that more than 97% of the cases mediated under the RLA have been resolved without resort to a strike. *Forty-Fifth Annual Report* 1 (1980). In this vein, petitioner (Pet. 17) points to statistics of New York's Public Employment Relations Board regarding the effectiveness of the Taylor Law in preventing public employee strikes. Between September 1967 and December 1980, there were 279 strikes by public employees covered by the Taylor Law, resulting in 4,105,000 lost work days. Within that time nine public transit employee strikes occurred, resulting in 370,500 lost work days (Pet. App. 77a). In sharp contrast, prior to the LIRR's six-day strike in December 1979, which was a part of the dispute leading to this litigation, there was but a single work stoppage by LIRR employees—in November 1972—subsequent to New York's purchase of the railroad in 1966 (Pet. App. 81a).

[29] On the other hand, the court of appeals' decision threatens to undermine and complicate the National Mediation Board's

2. The amendments to the Railway Labor Act (see pages 8-10, *supra*) enacted subsequent to the grant of certiorari eliminate whatever modest intrusion upon state decision-making the RLA might previously have been thought to present. As amended, the already "interminable" processes of the RLA designed to delay and discourage strikes are substantially lengthened. And the ability of publicly-owned and operated commuter railroads and the Governors of the states they serve to avoid strikes is substantially increased. Under the amended statute, any such carrier or Governor has an absolute right to obtain a "cooling off" period of as much as 240 days, four times the period applicable to private carriers, after the failure of the mediation process. Unlike

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administration of the Railway Labor Act. In the wake of the court's ruling, the NMB has determined that it must withhold its mediation services in disputes involving the LIRR, but has decided to continue to handle LIRR representational cases and arbitration matters under the RLA. *In the Matter of Long Island Railroad Co., etc.*, 8 NMB No. 89 (interim order, Mar. 9, 1981) (Pet. App. 63a-73a). The MTA, LIRR and the Staten Island Rapid Transit Operating Authority have contested the NMB's exercise of even this limited jurisdiction. *Metropolitan Transportation Authority* v. *National Mediation Board*, Civ. No. 81-0721 (E.D.N.Y., filed Mar. 11, 1981).

In its brief as amicus curiae, the New York State Public Employment Relations Board (PERB) argues that either the RLA or the Taylor Law should be held applicable in its entirety to the LIRR, and the other statutory scheme held to be entirely preempted, but the PERB takes no position as to which statute should apply (Br. 1-2). This submission by an agency of the State of New York tends to confirm our view that the RLA, if applied to the LIRR, would not displace the State's ability to make essential governmental decisions. The PERB also recognizes the integral relationship between the right to strike preserved by the RLA and the other provisions of that statute, stating (Br. 4) that "[t]he Taylor Law does not structure [employer-employee] relationships simply through prohibiting the strike any more than the RLA does so merely by allowing for such self-help."

privately-owned carriers, publicly-owned commuter railroads need not convince the NMB that a regional economic emergency is threatened and need not convince the President that he should exercise his discretion to establish an emergency board. Compare 45 U.S.C. 160. The new process is also designed to provide substantial incentives for reasonableness in bargaining by subjecting the positions of the parties to public scrutiny and ultimately imposing the penalty of forfeiture of railroad unemployment insurance benefits for the duration of any strike caused by unjustified union intransigence.

These special advantages for publicly-owned commuter authorities reflect congressional awareness of the sensitive considerations of federalism involved. See H.R. Rep. No. 97-153, *supra*, at 3. Even more than the general scheme of the Railway Labor Act, as applied in this case, the new provisions of the Act "were carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time" (*National League of Cities*, *supra*, 426 U.S. at 853, distinguishing and reaffirming *Fry* v. *United States*, *supra*)—here, the emergency period created in the rare instances in which the mediation procedures of the RLA fail to avert a work stoppage. And in such instances, as in *Fry*, the statutory scheme provides substantial benefits to the state. See 426 U.S. at 853.

In sum, where, as here, Congress has recognized the competing state and federal interests and has effected a reasonable accommodation that fully protects the concerns of the states, nothing in the Tenth Amendment or *National League of Cities* requires that the congressional scheme be cast aside. Congress has determined that the federal interest in maintaining the channels of interstate commerce requires that the LIRR be subject, like other railroads, to the provisions of the Railway Labor Act. In the circumstances of this case, there is no constitutional impediment to that legislative judgment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 333880 610